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In the

RAILWAY
G. E. L

UNITED S
CO

On Appeal
for

MEMORANDUM FOR THE UNITED STATES

Department of Justice,
Washington, D. C., 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 130

RAILWAY LABOR EXECUTIVES' ASSOCIATION, G. E. LEIGHTY AND D. S. BEATTIE, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

On Appeal from The United States District Court for the Eastern District of Virginia

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MEMORANDUM FOR THE UNITED STATES OF AMERICA

Sections 5(2) and 5(4) of the Interstate Commerce Act make the approval of the Interstate Commerce Commission a prerequisite to the consolidation of two railroads. The Commission must find that, subject to such terms and conditions as it deems necessary, the consolidation will be "consistent with the public interest," including "the interests of the [carrier] employees affected." Under the first sentence of Section

5(2)(f), as a condition to its approval, the Commission is required to impose a "fair and equitable arrangement to protect the interests of the railroad employees affected." The second sentence of this section specifies that the order of approval must include provisions assuring that for four years from the effective date of the order (or for the period of employment prior to such date, if the period is less than four years) the approved transaction will not result in the railroad employees affected by the order "being in a worse position with respect to their employment."

The instant case is presented on direct appeal from a judgment of a three-judge district court sustaining the adequacy of the employee-protective terms imposed by the I.C.C. as conditions of approval of the acquisition of control of Central of Georgia Railway Company by Southern Railway Company. The appellants, representing employees adversely affected by the consolidation of operations resulting from the acquisition of control, ask that this Court review the district court's decision and reverse it on two grounds. *First*, appellants attack the Commission's decision and order with respect to the omission, as protective conditions, of certain provisions of the Washington Job Protection Agreement of May 21, 1936 (a collective bargaining agreement entered into by the carriers and unions in this suit and by the great majority of all railroads and railroad brotherhoods since 1936). Appellants contend that the Commission's failure to include the provisions explicitly in its list of conditions is un-

supported by necessary explanation and findings of fact and results in an order so vague and uncertain as to require reversal. Appellants' questions 1 and 2 (J. S. 4-5). *Second*, appellants urge reversal of the Commission's refusal to extend its protections to employees who are not directly affected by a consolidation of facilities resulting from the acquisition of control. Appellants' question 3 (J. S. 5).

Since the underlying facts of the present case are set out in detail by the parties, we shall state them only as necessary to our argument. We agree with the appellants that the Commission's order with regard to the requested terms of the Washington Agreement cannot be sustained because it lacks necessary support by way of explanation or findings of fact. We submit that the Commission's decision with respect to the range of employees protected was correct and should be affirmed.

I.

THE COMMISSION'S CONCLUSIONS WITH RESPECT TO SECTIONS 4, 5, AND 9 OF THE WASHINGTON AGREEMENT ARE NOT SUPPORTED BY NECESSARY FINDINGS OR EXPLANATION

A. INTRODUCTION

1. THE WASHINGTON AGREEMENT AND ITS RELATION TO THE ENACTMENT OF SECTION 5(2)(f)

The Washington Job Protection Agreement of May 21, 1936, is an existing collective bargaining agreement between most of the country's railroads and railroad labor unions; it is designed to cover the matter of adjustments among carrier employees in the event of a

"coordination" (*i.e.*, a merger or unification of operations, facilities, or services of two railroads)—more particularly, to afford a means of determining the employees to be affected and the compensation to be paid the employees adversely affected. Sections 4 and 5 of the Washington Agreement provide that the selection of the particular employees to be fired, downgraded, or retained and the adjustment of employee seniority rosters shall be by collective bargaining, followed by arbitration if necessary, between the carriers and the unions of the employees involved. Section 9 of the Agreement gives a dismissed employee, otherwise eligible for monthly protective payments, an option to receive a lump-sum separation payment instead.

The legislative history of the Transportation Act of 1940, 54 Stat. 898, 906, indicates that the concept of "a fair and equitable" arrangement to protect employees under Section 5(2)(f) was conceived to include terms along the lines of the Washington Agreement. Representative Wolverton, a House conferee on the 1940 Act, explained during the House debates that the conferees "thought [they] were giving legislative assurance of * * * a continuance of the Washington agreement * * *." 86 Cong. Rec. 10189; see also 86 Cong. Rec. 5867-5868. In *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, this Court stated that the mandatory requirement for "fair and equitable" employee-protective conditions was based upon the recommendations of the Committee of Six appointed by the President in 1938 to recommend

legislation on transportation problems (p. 148), and that the Committee endorsed the Washington Agreement as a basis for the legislation (p. 149). See, also, *Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 173. The Court noted that while the bill was in conference the Legislative Committee of the Interstate Commerce Commission also recommended that employee protection be "by some such plan as is embodied in the so-called 'Washington agreement' * * *" (339 U.S. 151, n. 14).

2. THE NEW ORLEANS CONDITIONS

Prior to 1950 the Commission assumed that Section 5(2)(f) limited its power to protect employees adversely affected by a consolidation to the four-year period following approval of the consolidation, although the Washington Agreement provided protection and compensation in some cases for a longer period. In *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, this Court held that the Commission's assumption was erroneous. On remand, in the *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952), the Commission developed and imposed a new formula for protection of employees adversely affected by a consolidation of the operations of two raliroads. It superimposed, at least, the compensation provisions of the Washington Agreement—and, perhaps, all the provisions of this Agreement—upon certain protective conditions it had imposed in earlier cases (the so-called *Oklahoma* conditions).[1]

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[1] *Oklahoma Railway Company Trustees Abandonment*, 257 I.C.C. 177, 197-201 (1944).

The Commission discussed only the compensation provisions of the Washington Agreement, but it spoke broadly of incorporating the provisions of the Washington Agreement. It did not specify clearly whether all of the significant protections of the Washington Agreement (including Sections 4, 5, and 9) or only the compensation provisions were incorporated in the *New Orleans* conditions.

This ambiguity as to the meaning of the *New Orleans* conditions was never fully resolved between the date of the *New Orleans* case and the Commission's last opinion in the present case, although the Commission, in several decisions, has referred to the *New Orleans* conditions in general terms as adding the protection of the Washington Agreement to the protection provided by the *Oklahoma* conditions.[2] The general practice of the parties in subsequent cases where the *New Orleans* conditions have been imposed has been to negotiate agreements as to the employees to be affected by the consolidation, but it has never been determined by litigation whether the negotiation was required because the *New Orleans* conditions incorporated Sections 4 and 5 of the Washington Agreement or whether it was undertaken pursuant to the collective bargaining agreement itself. On several occasions, however, railroads have indicated their be-

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[2] *Wellsvile, A. & G. R. Corp. Purchase and Control*, 295 I.C.C. 115, 127 (1955); *Chesapeake & Ohio Railway Co.—Control—Baltimore & Ohio Railroad Co.*, 317 I.C.C. 261, 288 (1962); *Seaboard Air Line Railroad Company—Merger—Atlantic Coast Line Railroad Company*, 320 I.C.C. 122, 283 (1963).

lief that the *New Orleans* conditions include all of the protections of the Washington Agreement.[3]

3. THE COMMISSION'S REPORT AND ORDER IN THE PRESENT CASE AND THE DISTRICT COURT'S DECISION ON REVIEW OF THAT ORDER

In its first report in this case, the Commission said nothing to clarify the scope of the *New Orleans* conditions. It said only that "In principal substance, the *New Orleans* conditions superimpose upon the *Oklahoma* conditions the provisions of the Washington Agreement, the protection afforded by the *Oklahoma* conditions to be applied as a minimum" (J. S. 13a).

Indeed, the ambiguity of the protections intended in this case was compounded by uncertainty as to whether all, or only part, of the *New Orleans* conditions were to be imposed. Much in the Commission's opinion suggested that the *New Orleans* protections were intended. It said (J. S. 16a):

> It is our opinion that the protection afforded by the *New Orleans* conditions, modified in minor respects as hereinafter described, will more than meet the minimum requirements of section 5(2)(f) and will be fair and equitable to the employees and to the carriers involved in the transaction. In the past, these conditions have proved substantially acceptable to carriers and employees and have been upheld by the courts.

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[3] See, *e.g.*, Petition of the Pennsylvania Railroad, October 25, 1963, p. [illegible]; *Pennsylvania Railroad Co.—Control—Lehigh Valley Railroad Co.*, Finance Docket No. 21459, 317 I.C.C. 139, 148-149 (1962).

And the Commission concluded its first report with the statement that a "fair and equitable arrangement for protecting the interests of the employees * * * will be provided by imposing the conditions set forth in appendix II hereof" and that "[t]hese conditions conform substantially to the *New Orleans* conditions, with a modification * * * in the provision respecting arbitration of disputes" (J. S. 20a). Indeed, in its second report the Commission referred to the *New Orleans* conditions as being "incorporated in substance in article II" of the conditions imposed in its first report and described the conditions imposed in the present case as affording "substantially the same protection * * * given by the Washington Agreement of May 21, 1936, to which the affected carriers are signatories" (J. S. 34a). But, despite this language in its opinion and the appellants' request that the Commission include among its conditions Sections 4, 5, and 9 of the Washington Agreement, the Commission neither listed nor specifically incorporated these sections in its specification of employee-protective conditions set forth in Appendix II of its decision and order.

The appellants therefore sought review of the Commission order on the ground, *inter alia*, that it did not include Sections 4, 5, and 9 of the Washington Agreement. They contended that this omission departed, without explanation or reason, from the general practice and understanding under the *New Orleans* conditions. The railroads and Commission counsel[4] also assumed that the order did not include Sec-

[4] In its brief below, the Commission's counsel indicated that the Commission's references to the Washington Agree-

tions 4, 5, and 9 of the Washington Agreement, but defended the Commission's power to omit these provisions. The district court proceeded on the basis of the assumption made by all parties, *i.e.*, that these provisions had had been rejected by the Commission, and sustained the Commission's power under Section 5(2)(f) of the Act to omit them (J. S. 5a-6a).

4. SUBSEQUENT ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

The district court's decision, dated January 31, 1964, was followed by a supplemental and third report of the Commission (dated February 17, 1964, and served February 27, 1964) (J. S. 11, 39a).[5] The report was issued *sua sponte* and stated that it was solely a clarifying report (J. S. 11, 39a-40a). The Commission stated that in the proceedings before the district court "counsel for the parties, including the Commission, had urged or acquiesced in certain interpreta-

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ment were to the measure and amount of payments under that contract, and not to such procedural provisions as Sections 4 and 5, nor to Section 9 (Br., pp. 17, 24).

[5] While this case was pending before the district court, the Commission made further statements relating to the protective conditions imposed here, in its report in *Seaboard Air Line Railroad Company—Merger—Atlantic Coast Line Railroad Company*, 320 I.C.C. 122, 203-204. In the *Seaboard* report (at 203) the Commission stated that it was imposing "the *New Orleans* conditions * * *, as modified in the *Southern—Control—Central of Georgia* case * * *" and that "the major modifications of the *New Orleans* conditions provided for therein was the adoption of an arbitration clause * * *." It stated that the provisions here, and in *New Orleans*, included the lump-sum option found in Section 9 of the Washington Agreement. The appellant association has intervened in the *Seaboard* case.

tions of the conditions for the protection of employees which were not in accord with the Commission's intent and purpose in prescribing them" (J. S. 39a-40a); that it had not limited protection "to the protection set forth in Appendix II"; and that, when it stated in the first report the "protection afforded by the *New Orleans* conditions" would be "fair and equitable," it had thereby "incorporated all of the provisions of the *New Orleans* conditions, which embraced the provisions of the Washington Agreement, except as specifically modified in Appendix II." The Commission stated specifically that it had intended the railroads' employees to be "afforded the protection of all the provisions of the Washington Agreement of May 21, 1936, which were not specifically modified by the provisions set forth in Appendix II" (J. S. 40a).[6]

Southern has responded to the Commission's third report by instituting a further proceeding now pending before the district court in Alexandria, Virginia,[7]

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[6] Counsel for the Commission, on the same day as this clarifying report was served, wrote a letter to the judges of the court below and to the parties, enclosing a copy of the report. The letter stated that counsel for the Commission "had misinterpreted the conditions which the Commission had imposed for the protection of employees * * *" and that the Commission's conditions had embraced "the procedural provisions of Sections 4 and 5 of the Washington Agreement and the lump sum separation allowance provision of Section 9 of that Agreement" (J.S. 11).

[7] *Southern Railway Company and Central of Georgia Railway Company* v. *The United States of America and Interstate Commerce Commission*, Civ. No. 3376. Appellants have intervened.

in which it contends that it has acted in reliance upon the original construction of the Commission's decision and that the Commission's later expressed views are in fact an effort to modify its orginial opinions without the requisite notice or hearing and without jurisdiction.

Several railroad labor unions, in the meantime, have filed actions under the Railway Labor Act seeking to enforce Sections 4, 5, and 9 as terms of the applicable collective bargaining agreements, whether or not those sections were also made conditions of the Commission's approval of the consolidation of Southern and Central. In those actions, now pending on the unions' appeal in the Fifth Circuit,[8] Southern contends that the protective conditions imposed in Appendix II of the Commission's decision and order preempt or supersede any provisions of the collective bargaining agreements, including Sections 4, 5, and 9 of the Washington Agreement.

B. THE DISTRICT COURT ERRED IN HOLDING THAT THE COMMISSION COULD REFUSE TO IMPOSE SECTIONS 4, 5, AND 9 OF THE WASHINGTON AGREEMENT AS CONDITIONS OF THE CONSOLIDATION WITHOUT ANY EXPLANATION OF ITS ACTION AND WITHOUT SUPPORTING FINDINGS OF FACT

As stated above, the parties to the proceeding before the three-judge district court on review

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[8] *Brotherhood of Railway and Steamship Clerks, et al. v. Southern Railway Company and Central of Georgia Railway Company* (C.A. 5, Case No. 21,023); *Switchmen's Union of North America, et al. v. Central of Georgia Railway Company and Southern Railway Company* (C.A. 5, Case No. 21,016).

of the Commission's first order assumed that the order did not make Sections 4, 5, and 9 of the Washington Agreement conditions of approval of the consolidation. It was on this assumption that the court sustained the Commission's order over the appellants' objection that "it is neither fair nor equitable to remove from the conditions imposed, without reason, many of the protections which employees have so long enjoyed under the 'Oklahoma' and 'New Orleans' conditions" (J. S. 6a).

We believe that the court erred in sustaining the omission of Sections 4, 5, and 9 of the Washington Agreement when the Commission had offered neither explanation nor fact-findings to support its apparent failure to include them. These three sections embodied requests for additional affirmative relief which were obviously of major importance to the appellants. The Commission knew that appellants could reasonably believe that these terms had been included in a number of other orders incorporating the ambiguous *New Orleans* conditions. *Supra*, pp. 6-7 and n. 3. They were also terms upon which the parties had agreed in a valid and existing collective bargaining agreement, and the Commission's prior decisions had emphasized the fairness of incorporating such bargained-for protections as conditions of approval of a consolidation. See *New Orleans Union Passenger Terminal*, 282 I.C.C. 271 (1952). Finally, and perhaps more important, the legislative history of Section 5(2) of the Interstate Commerce Act indicates that Congress assumed that the Commission would at least carefully consider the desirability of con-

additioning approval of a consolidation on compliance with provisions akin to those found in the Washington Agreement. *Supra*, pp. 4-5.

In light of these factors, the Commission was, we submit, obligated to explain and provide factual support for any refusal to incorporate Sections 4, 5, and 9 as conditions of the consolidation.[9] On the dis-

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[9] While the appellants were far from clear and persistent in maintaining before the Commission their request for Sections 4 and 5, their actions adequately informed the agency that they were seeking these conditions as well as the protection of Section 9 (to which explicit reference was made on petition for reconsideration). This is apparent from the Commission's third report (February 17, 1964) where the Commissioners are unanimous on only one point: that they had before them and intended to dispose of the issue whether to include the disputed Washington provisions. It is confirmed by the apparent understanding of the parties—including the carriers—that this issue was presented to and determined by the Commission. For example, the brief filed by the railroads on July 15, 1964, in the district court in Alexandria, Virginia (see *supra*, pp. 10-11) makes wholly clear the carriers' understanding—apparently shared by the Commission—that the appellants "requested the Commission to impose condition expressly requiring, among other things, that proposed consolidations of facilities resulting from the transaction be with the consent of, or after arbitration with, representatives of employees of both carriers. These requests were derived in substance from Sections 4 and 5 of the 'Agreement of May, 1936, Washington, D.C.'" Brief in Civil Action No 3276, p. 3; the same understanding underlies the briefs of the railroads in the Fifth Circuit (Nos. 21,016 and 21,023), pp. 2, 5.

The district court was therefore correct in reviewing appellants' contentions as to Sections 4 and 5 on the merits and not rejecting them on the ground (then urged by the carriers) that a request for these provisions had not been adequately presented to the Commission. In the full context of

trict court's assumption that the provisions were omitted from the Commission's order, the Commission did not disclose "the basis of its order" or give "clear indication that it has exercised" its discretion. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168. Without such a supporting foundation in the Commission's opinion, the district court could not properly affirm an order omitting Sections 4, 5, and 9 of the Washington Agreement. The foundation could not be furnished by either the contestants or the Commission's counsel, and it could not properly be left to speculation: *Colorado-Wyoming Gas Company* v. *Federal Power Commission*, 324 U.S. 626, 634; *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U.S. 499, 511; *Secretary of Agriculture* v. *United States, et al.*, 347 U.S. 645, 654; *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156. Indeed, without such an exposition by the Commission, judicial review could not be meaningful. Thus, while the court below correctly refers to the Commission's authority "in its discretion to make findings, to reach different conclusions, and to impose

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this case appellants' actions were sufficient. They had requested provisions substantially identical to Sections 4, 5, and 9 in the appendices to their original brief to the Commission (Brief Before The Hearing Examiner). Moreover, in an exception to the Hearing Examiner's report, they quoted the Hearing Examiner's statement that the terms of the Washington Agreement had been requested "as a minimum" in the way of protective conditions and objected to the examiner's failure to provide even greater protection than the *New Orleans* conditions which, they stated, "contain only the protection contained in the Washington Agreement" (Exception 16).

different conditions predicated upon its evaluation of the facts of record relating to each individual transaction" (J. S. 5a-6a), neither the court nor the Commission pointed to any findings bearing upon the reasons for applying or not applying Sections 4, 5, and 9 to the particular case.

The importance of discussion and findings to explain the omission of the provisions here in issue is underscored by the disagreement within the Commission itself as to whether it meant to include these provisions. See the dissent of Commissioner Freas from the Commission's Supplemental Report of February 17, 1964 (J. S. 39a, 41a). The requirement that an agency furnish a supporting justification for its actions is intended to compel the agency carefully to consider and reach a reasoned disposition of each significant issue. While it appears in the instant case that the Commissioners were individually aware of the present issue (note 9, p. 13, *supra*), the Commission's Supplemental Report of February 17, 1964, indicates that the initial decision was reached without discussion of that issue and even without a common understanding as to how the Commission's report and order would dispose of it. Until an agency agrees on the meaning of its decision, a reviewing court cannot perform its function. As Justice Cardozo stated in *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U.S. 499, 511, "we must know what a decision means before the duty becomes ours to say whether it is right or wrong."

For this reason we do not believe that the decision below can be affirmed on the basis of the district court's

assumption that the Commission order did not incorporate Sections 4, 5, and 9 of the Washington Agreement. We also believe it clear that a remand to the Commission cannot be avoided by construing the Commission order to include the provisions, as the Commission now suggests. The Commission's decision is wholly lacking in explanation or Findings of Fact to support either the inclusion or the omission of Sections 4, 5, and 9. Moreover, the Commission, the unions, and the railroads all agreed in the district court that the provisions had been omitted by the Commission.[10] An agency order so ambiguous and vague as to mislead all of the parties to the administrative and judicial review proceedings cannot be sustained on judicial review. It is the first duty of an administrative agency to make clear what it is requiring and prohibiting. See *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co., supra; Federal Trade Commission* v. *Broch & Co.*, 368 U.S. 360, 367-368. When an agency has left its order in a state of complete uncertainty, clarification by judicial interpretation necessarily substitutes the discretion of the reviewing court for that of the agency; it prejudicies the parties both by denying them recourse to the discretion of the agency and by abridging their statutory right to judicial review of the agency's order.[11] The

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[10] The United States filed a "neutral answer" to the complaint, taking no position on the issues raised. It did not participate in the proceedings thereafter.

[11] In the present case, for example, Southern had no occasion to attack in the district court the construction of the

only appropriate disposition of such an order is to remand the proceeding to the administrative agency. The remand should require a determination, supported by appropriate explanation and findings, whether Sections 4, 5, and 9 of the Washington Agreement should be made conditions of approval of Southern's acquisition of control of Central. Such a remand would eliminate the ambiguities inherent in the Commission's present order and render unnecessary much of the litigation now pending in other courts. Uncertainty as to the meaning of the Commission's first order in this case is at the heart of the litigation now pending in the district court in Alexandria, Virginia, and in the Fifth Circuit. *Supra*, pp. 10-11. When the Commission has furnished the findings and explanation required by this Court's decisions, its order will no longer be ambiguous and the multiple litigation resulting from the ambiguity will be terminated.[12]

We recognize, of course, that the railroads may claim that they have acted in reliance upon their interpretation of the Commission's original order. Whatever the force of that claim—a point on which

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order now urged by the Commission; for in the district court all the parties agreed on a different construction of the order.

[12] A remand to the Commission because of deficiencies in its original report and order will presumably render unnecessary both litigation in the Fifth Circuit as to the asserted preemptive intent of the Commission's first order (*supra*, p. 11) and litigation in Alexandria, Virginia, as to the legal effect of the Commission's third, explanatory report (*supra*, (pp. 10-11).

we intimate no opinion at this juncture—it is no obstacle to the disposition which we suggest. We assume that the Commission will be free, on remand, to take into account and to give such effect as it considers warranted to any intervening reliance by any of the parties on their interpretations of the Commission's orders. *Burlington Truck Lines, Inc.* v. *United States, supra,* at page 172; *Ford Motor Co.* v. *NLRB,* 305 U. S. 364, 373-375; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134.

II.

THE COMMISSION CORRECTLY DETERMINED THAT SECTION 5(2)(f) DOES NOT REQUIRE PROTECTION AGAINST THE EFFECTS OF MODERNIZATION OR TECHNOLOGICAL INNOVATION

A. INTRODUCTION

Before the Commission, and again before the three-judge district court, the appellants contended that the Commission's order was defective for a further reason which is now made the third ground of their appeal in this Court. They argue that the Commission erred in limiting its protection of railroad employees affected by the consolidation to those directly affected by an elimination of duplicative facilities and by excluding from protection those employees more remotely affected by internal modernization or other economies made possible in part by the improved financial position of the roads which might result from the consolidation.

While we believe that a remand is necessary for the reasons set forth in Point I, we do not believe that

this further issue presents a substantial question warranting further review.

B. THE COMMISSION AND THE DISTRICT COURT CORRECTLY DISPOSED OF APPELLANTS' CONTENTIONS WITH REGARD TO THE RANGE OF EMPLOYEES PROTECTED BY THE COMMISSION'S ORDER

The Commission, we believe, acted within its powers in declining to provide protection for employees who might be adversely affected by technological improvements or modernization of facilities only remotely traceable to the acquisition of control (J. S. 32a-33a). Section 5(2)(f) of the Act deals with a single problem: changes in employment resulting from the consolidation of facilities or operations traceable to a coordination. Insofar as a coordination may also result in improved financial conditions, which would in turn permit the railroad to take advantage of new labor-saving devices, a quite discrete problem is presented. Perhaps it is one which deserves its own special solution either by the Congress or by the voluntary actions of the employers and employees in the course of collective bargaining. However, nothing in the legislative history or the language of Section 5(2)(f) suggests that Congress was concerned with this wholly separate problem when it enacted the 1940 statute.

As the Commission pointed out, "the effect of subsequent internal technological improvement by either of the carriers, even if made possible by improved financial circumstances partly attributable to the unification of control, is too indirect and remote to be considered a result of the transaction" (J. S. 33a.) In cases where it is disputed whether an adverse

effect upon certain employees is a result of the consolidation or of an improvement having independent origin, the matter is to be determined by arbitration. The Commission did not undertake to prejudge such a case.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be vacated insofar as it relates to Sections 4, 5 and 9 of the Washington Agreement, and the case remanded to the Commission with instructions to amend its opinion and order as necessary to deal with appellants' request that those Sections be incorporated as protective conditions, indicating specifically why each of these requested protections is either included or omitted. In all other respects, we believe that the judgment should be affirmed. This disposition, in our view, does not require plenary argument.

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